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No. .....

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In the Supreme Court of the United States

October Term, 1980

PEGGY TATE SMITH, Administratrix of the Estate of James E. Tate, Deceased,
Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. What are the standards which determine whether a federal judicial officer must disqualify himself—and what statutes and rules permit waiver of those standards?

2. Do seamen lose all of their federally protected rights if they step ashore in the performance of their traditional maritime duties and are killed or injured by a land-based agency?

LIST OF PARTIES

The plaintiff-petitioner is Peggy Tate Smith, administratrix, Estate of James E. Tate, Star Route, Dunlap, Tennessee 37327. Her attorneys are Victor G. Hanson, 19268 Grand River Avenue, Detroit, Michigan 48223 and Ned L. Mann, 410 Hanna Building, Cleveland, Ohio 44115.

The respondent-appellee is The Chesapeake and Ohio Railroad Company. Its attorneys are Robert A. Straub and James M. Baysinger (P10569) Cross, Wrock, Miller & Vieson, 400 Renaissance Center, Suite 1900, Detroit, Michigan 48243.

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OPINIONS BELOW

The Memorandum of the trial court, in overruling petitioner's Motion for a New Trial is reproduced in the Appendix at pages A12-A16.

The Order of the panel of the Court of Appeals for the Sixth Circuit is reproduced in the Appendix at pages A17-A20.

The Order of the Circuit Court of Appeals denying the Petition for Rehearing En Banc is reproduced in the Appendix at page A21.

JURISDICTION

The Order of the Court of Appeals was entered on June 20, 1980. Petition for Rehearing En Banc was duly filed. Petition for Rehearing was overruled on September 4, 1980.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 17 of the Supreme Court Rules, effective June 30, 1980.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28 § 455. Disqualification of Justice, Judge or magistrate.

> (a) Any justice, judge or magistrate of United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

STATEMENT OF THE CASE

James E. Tate was a winch operator aboard a vessel loading coal. The ship was being shifted during that operation by moving the mooring lines, tied to bollards, on the respondent's dock.

The dock was poorly lighted. Its facing was chipped and cracked.

When last seen alive, Tate was at the mooring line winch. A scream was heard. Later, Tate's body was found in the water. He had drowned.

His widow, as administratrix, sued the vessel owner alleging negligence and unseaworthiness.

She also sued the stevedore-respondent, averring negligence in maintenance of its dock.

Just before the jury trial began, on March 30, 1978, petitioner settled her case against the shipowner. The trial proceeded against this respondent.

Over objections, the trial court ruled that Ohio law, not maritime law, would apply to the action. He instructed the jury that assumption of risk or contributory negligence would constitute complete defenses against the claims made by the petitioner.

The jury found both the petitioner's decedent and the respondent guilty of negligence.

The trial court rejected the jury verdict and directed that the verdict could be only for one party or the other under Ohio law. The jury, bound by the instructions under Ohio law, returned a verdict in favor of the defendant.

On the last day of trial petitioner learned, from respondent's counsel, that the trial judge and his wife were involved in personal litigation in the state court against a defendant who was represented by the same counsel representing the stevedore in the case then in trial.

He told the appellant that the trial judge was to be examined in his private litigation a few days after the case in trial had been concluded.

The facts bearing upon the recusal issue do not appear in the trial record. They appear in the record of the proceedings, for the first time, as part of the Motion for a New Trial.

After the jury had returned a verdict in favor of the defendant-respondent, plaintiff filed a Motion for a New Trial, setting out, as grounds therefor, the trial court's failure to recuse himself and its failure to apply maritime law as to the issue of negligence (A. p. A10).

The trial court, in overruling the Motion for a New Trial, filed a Memorandum (A. p. A12) in which he stated the recusal issue had not been timely raised; and, in substance, had been waived.

An appeal from that decision was perfected to the Court of Appeals for the Sixth Circuit. It was argued on June 6, 1980. On June 20, 1980, two weeks later, by peremptory "Order," the Circuit Court affirmed the trial court, rejecting appellant's contention that any waiver of disqualification under 28 U.S.C. 455(a) and (e) and the Code of Judicial Conduct could be accepted and become effective only after full disclosure on the record.

The Order, as to the recusal issue, found as to the petitioner "In any event plaintiff waived this issue by knowingly failing to present it prior to the jury verdict."

As to the choice of Ohio law rather than maritime law, the Court of Appeals construed *Executive Jet Aviation v. Cleveland* (409 U.S. 249, 1972), as requiring two tests (locality plus traditional maritime activity) for the exercise of maritime jurisdiction, rather than the existence of either, where seamen performing their sea duties are concerned (A. p. A19).

A Petition for Rehearing En Banc was filed in the Court of Appeals on July 23, 1980. The petition was denied on September 4, 1980.

The Petition for a Writ of Certiorari was duly filed in this Court.

REASONS FOR GRANTING THE WRIT

This Petition meets two of the criteria for review on certiorari, delineated in Rule 17 of the Supreme Court Rules. It asks this Court to:

(a) resolve a conflict of decisions between two courts of appeals on the critical issue of disqualification of federal judges, and

(b) spell out, unequivocally, in the exercise of its supervisory powers, rules of conduct governing recusal, or its waiver, under 28 U.S.C. § 455 and the Code of Judicial Conduct.

It seeks further to have this Court require the application of maritime law to causes involving death or injury to seamen who are killed or injured by a land-based agency while performing their traditional maritime duties.

1. What are the standards which determine whether a federal judicial officer must disqualify himself—and what statutes and rules permit waiver of those standards?

This petition, as have others, raises a critical issue regarding the standards of conduct which guide all judicial officers of the courts of the United States.

Members of the Supreme Court, from time to time, have laid down rules of conduct and qualifications intended to govern the practice of counsel appearing in the federal courts.

However, this Court has declined, repeatedly, to prescribe guidelines for the disqualification of federal judicial officers.

The result has been a vast morass of conflicting case law at the trial and appellate levels.

In the instant case, for example, both the trial court and the Court of Appeals have arrogated to themselves the right to ignore statutory prohibitions against waiver of disqualification.

It would appear, however, that this Court is becoming increasingly concerned about the maze of contradictory applications of the disqualification criteria. The 1978 Report of the Proceedings of the Judicial Conference of the United States notes that:

> "Judge Tamm and the Judicial Conference authorized distribution of the Federal Judicial Center staff paper entitled 'Decisions Construing the Judicial Disqualification Statute' to all judicial officers."

It is respectfully urged that the instant Petition affords this Court an opportunity to lay down guidelines, pursuant to its supervisory powers, which will produce uniform applications of the judicial disqualification statute in the United States courts.

As noted in the Statement of the Case, this Petition squarely raises the question whether a trial judge should recuse himself in a situation where he believes he can be impartial, yet extrajudicial facts might make it appear to a reasonable person that his impartiality might reasonably be questioned.

What is the standard?

How should the federal courts apply it?

Is the standard that which Judge Hauk laid down for himself in *State of California v. Kleppe*, 431 F. Supp. 1344 (D.C. Cal., 1972)?

There, though he stated he did "not have, nor did he ever have, any personal bias or prejudice in the slightest degree," he nonetheless felt duty bound to recuse himself.

When those parties offered to waive under § 455(e) he stated:

> "It follows now . . . that if the court is to follow the Code of Judicial Conduct, it cannot accept a waiver of any disqualifying matter, whether it be under 28 U.S.C. 455(a) or (b) or whether it be under the code of Judicial Conduct, Canon 3 C, or otherwise."

Or, is it the standard set out by the same trial judge who heard this cause, in *Bradley v. Milliken*, 426 F. Supp. 929 (S.D. Mich., 1977)?

There, he held the motion for recusal was untimely because the parties knew of his extrajudicial conduct months before the motion was filed. He found the statute had been waived, even though the court had not requested a waiver and none had been given.

It should be noted, however, that after the trial court had determined the disqualification issue had been waived, he referred the question to another judge for dispositive determination.

Further, is the statute (28 U.S.C. § 455) self-executing, without the necessity of a Motion, as stated in *Barry v. United States*, 528 F.2d 1094 (7th Cir., 1976) and *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir., 1980)?

Or, does the statute require the parties to discover the extrajudicial facts upon which a Motion to Disqualify may be predicted, before trial, and to raise that issue before or during trial by Motion (as the courts have concluded in the instant appeal)?

Those are questions raised by this appeal. For, it was only by inadvertence that the facts which might support recusal were made known to this petitioner on the last day of trial, through a casual remark made by respondent's counsel.

The case law confusion is further exemplified by the contradictions in the kind of proof required to support recusal.

Is it necessary to establish, by the reasonable man standard, that the trial judge is biased or prejudiced as required by 28 U.S.C. 144? (*Davis v. Commissioners*, 517 F.2d 1044, *cert. den.* 425 U.S. 944.)

Or, do the two statutes (28 U.S.C. 144 and 455) set out separate and distinct bases for disqualification? (*United States v. Baker*, 441 F. Supp. 612 (M.D. Tenn., 1977).)

All of the questions posed could be determined by the resolution of the instant appeal.

Here, the Circuit Court found the plaintiff had "waived this issue (recusal) by failing to present it prior to the jury verdict."

That finding was made in the face of the undisputed fact that there was no disclosure by the trial court of his personal involvement with respondent's counsel in the trial record.

In substance, the Circuit Court absolved the trial court from the duty of full disclosure on the record, and cast upon the parties the duty of discovering extrajudicial facts known only to the court and third persons.

That finding conflicts with the construction of the disqualification statute by the United States Court of Appeals for the Fifth Circuit. In *Potashnick v. Port City Construction Co., supra,* that Court stated (p. 1115):

"The statute imposes, however, no duty on the parties to seek disqualification, nor any time limits within which disqualification must be sought."

The Sixth Circuit ruling also is in direct conflict with that of the Seventh Circuit. In *SCA Services, Inc. v. Morgan,* 557 F.2d 110, that court viewed the waiver provisions of § 455(e) as applied to subsection (a):

". . . waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

"The provisions are mandatory. . . . They were adopted because the drafters of the statute believed that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver."

The Fifth and Seventh Circuits' views, in opposition to the Sixth Circuit's position on waiver, are consonant with the legislative history of the disqualification statute.

It should be noted that the Judicial Conference of the United States opposed the enactment of the 1974 amendment. (U.S. Code Congressional and Administrative News, 1974, pp. 6359-6360.)

In its submission to the House Committee, it stated:

"The Judicial Conference of the United States recommended the law not be enacted because it is unnecessary and it would be unwise to write the provisions of the new A.B.A. code into a statute at this time . . . since . . . (disqualification) is already in full force and effect in the Federal Judiciary by virtue of the adoption of the Code of Judicial Conduct for United States Judges by the Judicial Conference in April, 1973."

Nonetheless, Congress did enact the statute containing even more restrictive language than that contained in the Conference's Code and that adopted by the A.B.A. particularly on the requirements for waiver.

In virtually every case in which disqualification was an issue, the facts underlying the contention were made known, either by a party on motion, or *sua sponte,* by the judge in advance of trial.

The disqualification issue was on the trial record in those cases, fully discussed and considered as part of that record (*Potashnick v. Port City Construction Co., supra; Barry v. U.S., supra* (1976); *State of California v. Kleppe, supra* (during briefing period but prior to trial); *United States v. Conforte,* 457 F. Supp. 641; *Baker v. City of Detroit,* 458 F. Supp. 374 (1978); *Fredonia Broadcasting Corp. v. RCA Corp.,* 569 F.2d 251 (5th Cir. 1978); *S. J. Groves & Sons v. Int. Bro. of Teamsters,* 581 F.2d 1241 (7th Cir. 1978); *United States v. Baker,* 441 F. Supp. 612 (1977) and cases cited in 40 A.L.R. Fed. in the Annotations beginning on p. 956.)

As far as petitioner can determine, the Sixth Circuit is the only appellate court in the country that has determined it is not necessary for a judge to make full disclosure on the record before he can accept or find a waiver of disqualification.

The petitioner urges the Writ should be granted since it is imperative that a uniform standard of judicial conduct be set by this Court as applies to the disqualification of federal judicial officers and its waiver.

2. Do seamen lose all of their federally protected rights if they step ashore in the performance of their traditional maritime duties and are killed or injured by a land-based agency?

The Court of Appeals for the Sixth Circuit has found that seamen lose their federally protected rights when they are ashore performing their traditional maritime duties and are killed or injured by a land-based agency.

The Sixth Circuit has concluded *Executive Jet* requires seamen to meet two (rather than one) jurisdictional tests before they are entitled to the protection of their federal rights guaranteed under maritime law.

Petitioner urges that this Court, in *Executive Jet,* had discarded the strictures of the "locality" test of maritime jurisdiction. While not rejecting that test in its entirety, it relegated "locality" to a secondary role in the exercise of maritime jurisdiction.

The "locality plus" test was the addition of a new basis of maritime jurisdiction, not the creation of a new hurdle against its assertion, as petitioner views it.

In *Executive Jet,* this Court found it made more jurisdictional sense to look to a maritime nexus, a traditional maritime function, rather than to limit the jurisdictional inquiry into the place where the incident occurred.

It was for that reason this Court rejected the jurisdictional basis upon which the Sixth Circuit had affirmed the decision of the trial court.

In affirming the final judgments below, this Court found affirmance was dictated by the fact that aircraft (in flight from a point on land, over land, to another point on land) did not meet the test of a traditional maritime function, the transportation of passengers over water.

It did not base affirmation on the locality test, the place where the wrong occurred.

Petitioner's reading of *Executive Jet* is fortified by the view which Professors Bridwell and Whitten hold in *Admiralty Jurisdiction: The Outlook for the Doctrine of Executive Jet,* DUKE LAW JOURNAL, Vol. 1974, p. 757, at p. 758:

> "It is clear that the Supreme Court in Executive Jet adopted a new approach by rejecting the old locality test for admiralty tort jurisdiction. At the same time, the Court did not completely abandon that test."

In dealing with post *Executive Jet* applications of maritime jurisdiction, the authors note (at p. 773) that a number of courts read that decision as rejecting the locality test and leaving the maritime nexus as the only relevant criterion for admiralty jurisdiction.

They note (in their footnotes) that other courts have differed.

They believe (p. 774):

> "Thus a finding . . . that the action of the plaintiff was that of a traditional function of a seaman—would independently support the finding of an adequate maritime nexus for jurisdictional purposes."

The authors conclude (p. 792):

> "The only reasonable result dictated by Executive Jet is the interpretation that the locality test has been effectively rejected, leaving the maritime nexus as the only operative portion of the rule of admiralty jurisdiction."

In the case here presented, the seaman was handling the mooring lines of a vessel, on shore on a defective dock, when he fell into the water and drowned. He was a sea-

man. He was performing that which is, has been, and always will be a traditional maritime function.

The circuit court paid homage to one of its own "locality" decisions, decided years before *Executive Jet,* and ignored the plain mandate of this Court.

It gave no effect to the caveat of this Court *Moragne v. States Marine Lines,* 398 U.S. 375, or *Gaudet v. Sea-Land Services, Inc.,* 414 U.S. 573, in which this Court cautioned the courts below:

> ". . . certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." (Quoting from *The Sea Gull,* 21 F. Case No. 909 in *Moragne*)

It is pivotal that the jury in this case had found *both* the defendant and the plaintiff guilty of negligence in the death of plaintiff's husband.

The trial court refused to accept that finding and instructed that under Ohio law either contributory negligence or assumption of risk were complete defenses to a charge of negligence and the verdict had to be for one party or the other (A. p. A6).

That instruction stripped the petitioner's decedent of all protection under federal law; statutory and general maritime law, which provide for an assessment of comparative negligence.

The court, in substance, told the jury it had to absolve the defendant of all liability, if it found the decedent guilty of contributory negligence or assumption of risk in any degree.

That ruling, now fortified by the affirmance of the Court of Appeals, takes from every seaman the right to

assert the doctrine of comparative negligence, guaranteed under federal statutory and general maritime law, if he is killed or injured by a land-based agency while performing a seaman's duties ashore.

The Court of Appeals, by affirmation, destroyed the monition of *Moragne* (p. 387) which states that admiralty law includes "a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages."

The anomalies created by the application of the "locality" test to the instant case are almost as striking as those which faced the Supreme Court in deciding *Moragne.*

For example, if injury or death resulted in an employee of defendant, C. & O., on the dock, due to fault on the part of Chesapeake, assumption of risk and contributory negligence would not be a complete defense to the railroad. F.E.L.A. (like the Jones Act in respect of seaman) applies the doctrine of comparative negligence. That right was taken from this plaintiff by application of local Ohio law (45 U.S.C. 51-60).

An additional contradiction. If a seaman engaged in sea duty were injured or killed on land due to negligence of the ship, he would have the protection of the Jones Act, General Admiralty Law and the F.E.L.A. (The protection of those federal rights were taken from this plaintiff by application of local Ohio law (46 U.S.C. 688 and 46 U.S.C. 740).)

One step further. If a longshoreman were injured or killed on the dock while on duty, due to the negligence either of the ship or the railroad, he would have the protection of the Longshoremen and Harbor Workers Act (33 U.S.C. 901, et seq.).

The certainty of award (regardless of fault) embodied in this federal statute, was taken from this plaintiff by application of local law.

In each of the anomalies cited above, federal statutes and federal common law protected the rights of special classes of workers, the most favored of which is the seaman, because of admiralty's "special solicitude" for him.

If, for example, Tate had died after June 20, 1980 at the Ohio dock—or—if he had died at a dock in Duluth, under the same circumstances, the law would have measured damages by the rule of comparative negligence by application of state law.

CONCLUSION

Petitioner is well aware of the incredible burden of requests for review which this Court has been asked to bear.

She understands the grant of certiorari is a rarity because of the staggering load this Court is asked to carry.

Nevertheless, nothing transcends the importance of the judicial standards of justice and impartiality in the federal judicial system.

Indeed, the appearance of impartiality is as important as the fact itself.

The trial courts of the federal system have no right to vary the standard whenever it suits some purpose of theirs.

And the reviewing courts should require the trial courts to adhere to the statutory and disciplinary rules of judicial conduct.

The appellate courts should not be permitted to vitiate Congressional enactments whenever a particular case strikes a discordant note on their personal judicial scale.

Whether this particular petition receives favorable or unfavorable response (grant or denial of certiorari) undoubtedly is unimportant by the measure of the countless petitions this Court must weigh in the course of its considerations.

However, the responsibility of the Supreme Court to supervise the administration of justice in the United States courts is a duty that extends far beyond the narrow confines of this particular appeal.

This Court, at one point or another, must put reins on the unfettered power of the trial courts to determine, in each case, what constitutes judicial propriety.

We respectfully urge the time is now and the case is here.

The other facet of this Petition may be of secondary importance.

The lives and welfare of hundreds of thousands of seamen in the United States appear to be a matter of minor significance to the courts of the Sixth Circuit.

The questions of maritime jurisdiction which were left in the wake of *Executive Jet,* in the view of the petitioner, demand resolution.

The choice of law, in the case of seamen killed or injured while performing their maritime duties, should not be left to the vagaries of the laws of 50 states.

The seamen deserve, and should be accorded the protection of their federal rights guaranteed under federal statutory and general maritime law.

Respectfully submitted,

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APPENDIX

JURY VERDICT

(Filed April 7, 1978)

Civil Action No. 672332

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PEGGY TATE SMITH, Administratrix of the Estate of James C. Tate, Deceased,
Plaintiff,

vs.

BOLAND & CORNELIUS,

and

AMERSAND STEAMSHIP CORPORATION,

and

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendants.

JURY VERDICT

[2] The Court: All right. I should advise counsel that the Court is in possession of two notes. The first one says: "We have reached a decision."

Simultaneously with that note, that is not signed, there is another note handed to the clerk saying:

"We the jury believe that the deceased, Mr. Tate, fell from the lower deck without a life jacket on and

drowned because of poor lighting on the dock." Signed Alex Maxey.

Now, Mrs. Stamps, bring in the jury, and we will take the verdict.

Do you know what that means? I can't make that out.

Mr. Baysinger: I think it's inconsistent, but we wanted to place some objection to the jury instructions.

The Court: What?

Mr. Baysinger: Wanted to place some objections to the jury instructions on the record, and we [3] wanted to also apparently submit to the Court that they were not on the record as far as our objections to the exhibits. We just wanted to make sure they were placed on the record.

The Court: Well, you can do that after the verdict is received.

(The jury enters the courtroom at 3:28 p.m.)

The Court: I cannot make this out. Is this intended to be delivered to the Court before the verdict?

Mr. Maxey: Yes, sir.

The Court: But you have arrived at a verdict, have you?

Mr. Maxey: We have, your Honor, except that on the sixth question that you asked us we have—we had a question of one word that they felt they needed the definition to.

The Court: One word in the question?

Mr. Maxey: One word in one of the questions.

The Court: Which question?

Mr. Maxey: Question number—we didn't bring it in because we left it there so we thought we were going to get an answer. It's approximate.

The Court: Oh, proximate?

[4] Mr. Maxey: Yes.

The Court: That is in one of the questions?

Mr. Maxey: Yes, it is.

The Court: Well, did you bring the verdict with you?

Mr. Maxey: No, we left it because it wasn't finished. We hadn't filled it out.

The Court: Well, I am going to have to ask you to return, Mr. Maxey, and complete the questions and then bring the verdict and the questions in with the answers.

I will excuse you, and you can go in and complete that.

Mr. Maxey: Okay.

The Court: You realize there are seven questions, there is not six. I think you said six, Mr. Maxey. There are seven questions there. You will let us know when you have those questions answered.

* * * * *

The Court: Take the verdict.

The Clerk of the Court: Mr. Foreman, would you please stand.

[5] Members of the jury and Mr. Foreman, have you agreed upon a verdict?

Mr. Maxey: We have.

The Clerk of the Court: And would you read your verdict to the Court for the record?

Mr. Maxey: Would that be the six questions?

The Court: Your verdict.

Do I understand, Mr. Maxey, that all you did was answer the questions?

Mr. Maxey: No, we have them answered. We find, Judge, that that was negligence on both parts.

The Court: I am not very clear, Mr. Maxey. Did you not arrive at a verdict?

Mr. Maxey: It was—

The Court: (Interposing) There are two verdicts that you could return. One, "We find in favor of the Plaintiff." Or as I said, the other being: "We find in favor of the Defendant, no cause for action."

Mr. Maxey: We did not. It was difficult, and in determining who was really at fault, that's why we say we were—it was the fault on both parties, and that's how we come to a conclusion here.

I guess it's difficult to understand [6] unless I can just go into the whole thing.

The Court: Well, Mr. Maxey, I am going to have to send you back in the jury room. You can only return one of two verdicts, either in favor of the Plaintiffs or return a verdict in favor of the Defendant, no cause for action. I will have to send you back into the jury room.

(3:35 p.m.)

(The jury enters the courtroom at 5:15 p.m.)

The Clerk: Mr. Foreman and members of the jury, have you agreed upon a verdict?

Mr. Maxey Yes.

The Clerk: How do you find?

Mr. Maxey: We the jury find in favor of the Defendant.

The Court: No cause for action?

Mr. Maxey: No, sir.

The Court: Well, Mr. Maxey, I apologize to you. You did follow the Court's instruction on returning a general verdict before you answered the questions. I learned sometime after that you were not presented with a verdict form. Now, there is a miscommunication between my clerk and I, and when I gave her the questions I wanted answered I gave her instructions specifically to give you a verdict form.

[7] Now may the Court have the questions?

Very well, members of the jury having found in favor of the Defendant, of course, there will be no need to treat the liability question. So, I will excuse you. And since there is a couple of you, for whatever it is worth, that just served on the first jury, I have to say I agree with your verdict. So, there is no problem there. I probably viewed the evidence the same way you did. Anyway, you did perform a good service.

I apologize for the delays that were occasioned here, especially in receiving the verdict from you. I have had a courtroom full of people here, and I have been going steady since two p.m. and I think we had one five-or-ten minute recess. I simply could not get to you.

The last time you came out, as a matter of fact, you probably saw the crowd. We were on a recess, and I took that to take your verdict. But I do apologize for those delays, and thank you very much.

(The jury excused at 5: 16 p.m.)

(Matter concluded.)

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed April 21, 1978)

Civil Action No. 672332

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PEGGY TATE SMITH, Administratrix of the Estate of James C. Tate, Deceased,
Plaintiff,

vs.

BOLAND & CORNELIUS,

and

AMERSAND STEAMSHIP CORPORATION,

and

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendants.

JUDGMENT

This cause having come on for trial by jury, and the jury having been presented with all the proofs and following deliberations rendered a general verdict in favor of the defendant and having in addition thereto responded to six written interrogatories;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing and that the defendant Chesapeake and Ohio Railway Company shall have judgment of no cause for action;

IT IS FURTHER ORDERED AND ADJUDGED

that cross-plaintiff Amersand Steamship Company take nothing and the cross-complaint shall be and hereby is DISMISSED;

IT IS FURTHER ORDERED AND ADJUDGED

that defendant Chesapeake and Ohio Railway Company's motion for directed verdict be and the same hereby is DENIED as mooted by the jury verdict.

Dated at Detroit, Michigan, this 21st day of April 1978.

/s/ ROBERT E. DEMASCIO
United States District Judge

MEMORANDUM AND JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed April 24, 1978)

Civil Action No. 672332

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PEGGY TATE SMITH, Administratrix of the Estate of James C. Tate, Deceased,
Plaintiff,

vs.

BOLAND & CORNELIUS,

and

AMERSAND STEAMSHIP CORPORATION,

and

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendants.

MEMORANDUM AND JUDGMENT

(Filed April 24, 1978)

This cause came before the court for trial by jury on March 29, 1978. When the case was called, it was apparent that the parties had not complied with the court's order requiring the filing of a joint pretrial order designed to define the issues to be tried. The trial was adjourned and the parties were directed to file the joint pretrial order on the following day, which they did. When

the tardy joint pretrial order was filed, the court was made aware of the fact that plaintiff had settled its claim with Amersand Steamship Company. The parties did not disclose the amount of that settlement in any of the pleadings filed or in the tardy joint pretrial order. In plaintiff's opening statement, counsel, nevertheless, advised the jury that not only had the case settled but that the settlement was in the amount of $35,000. Thereafter, the defendant Chesapeake and Ohio Railway Company (C & O Railway) moved for a mistrial. The court agreed that the defendant could well be prejudiced by plaintiff's disclosure of the settlement amount. In order to repair that prejudice, the court decided to bifurcate the trial and submit only the issue of liability to the jury. Moreover, six questions were presented to the jury which Amersand Steamship Company agreed would dispose of its counterclaim against C & O Railway. The jury found a general verdict in favor of the defendant C & O Railway and its response to the questions presented indicated that the C & O Railway was not guilty of negligence, that the plaintiff was guilty of negligence which proximately caused or contributed to his death, and that plaintiff's decedent assumed the risk of the unsafe dock and improper lighting alleged in the complaint. Accordingly, judgment may be entered in favor of the defendant C & O Railway.

IT IS SO ORDERED.

/s/ ROBERT E. DEMASCIO
United States District Judge

MOTION FILED IN THE UNITED STATES DISTRICT COURT TO SET ASIDE THE VERDICT OF THE JURY AND THE JUDGMENT ENTERED THEREON AND TO GRANT A NEW TRIAL

(Filed May 1, 1978)

Civil Action No. 672332

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PEGGY TATE SMITH, Administratrix of the Estate of James C. Tate, Deceased,
Plaintiff,

vs.

BOLAND & CORNELIUS,

and

AMERSAND STEAMSHIP CORPORATION,

and

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendants.

Peggy Tate Smith, Administratrix of the Estate of James E. Tate, deceased, moves the Court to set aside the verdict of the jury returned on April 7, 1978 and the Judgment entered thereon on April 21, 1978 and to grant a new trial on the following grounds:

1. The verdict is against the weight of the evidence.
2. The verdict is against the prevailing law.

3. The court should grant a new trial because of the court's connection with the law firm representing the defendant, Chesapeake and Ohio Railway Company, in regard to current litigation pending in Wayne County Circuit Court involving a suit by the Honorable Judge DeMascio. The defendant, Chesapeake and Ohio Railway Company's attorneys represent the defendant in said case. That within a matter of days from the time that this case was in trial, the Honorable Judge DeMascio was to testify in that case and was to be cross-examined by the defendant Chesapeake and Ohio Railway Company attorneys. Said representation was made during the trial of this case by the defendant Chesapeake and Ohio Railway Company attorneys to the plaintiff, Peggy Tate Smith, and others. Said case in Wayne Circuit Court is entitled Robert E. DeMascio and Margaret Mary DeMascio vs. Detroit Towers Associates, Ltd., and Towers Realty Company and bears Civil Action Number 74-009528 CH.

That said litigation involves a suit in regard to the purchase of a condominium and the defendant C&O attorneys control settlement discussions and other decisions in that case. They also control the questions to be asked Judge DeMascio under oath. The plaintiff respectfully submits that the trial judge should have disqualified himself or disclosed to the plaintiff the details of his litigation pending in Wayne County Circuit Court. That it is improper for him to sit on the trial of this case and that another judge should be designated in this cause.

/s/ VICTOR G. HANSON
VICTOR G. HANSON (P14626) and
MICHAEL F. KENNY (P24721)
19268 Grand River Avenue
Detroit, Mi - 48223
Phone: (313) 532-1220
Attorneys for Plaintiff

MEMORANDUM OF THE UNITED STATES DISTRICT COURT RE MOTION

(Filed June 19, 1978)

Civil Action No. 672332

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PEGGY TATE SMITH, Administratrix of the Estate of James C. Tate, Deceased,
Plaintiff,

vs.

BOLAND & CORNELIUS,

and

AMERSAND STEAMSHIP CORPORATION

and

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendants.

The plaintiff administratrix first filed this action against Boland & Cornelius, Manager of the Freight Operations for Amersand Steamship Company, owner and operator of the S.S. McKee Sons. When plaintiff's decedent met his untimely death, he was employed as a wheelsman aboard the S.S. McKee Sons. The plaintiff alleged that an employee of defendant Amersand Steamship Company (Amersand) made a defective tie of the No. 1 mooring line, that plaintiff's decedent left his station aboard ship and descended the forward ladder to repair the improper tie, and that in doing so plaintiff's decedent was

thrown or fell into the river and drowned. By order of the court, plaintiff was permitted to file an amended complaint in which she joined as a defendant The Chesapeake and Ohio Railway Company (C&O). In Counts I and II of her amended complaint, she alleged that the defendant Amersand was negligent in making a defective tie of the No. 1 mooring line, in failing to furnish plaintiff's decedent with a safe place to work, and in failing to provide plaintiff's decedent with a seaworthy vessel. In Count III, plaintiff alleged that the C&O negligently failed to provide a safe dock. The defendant Amersand filed a cross claim against C&O alleging that any liability it might be subjected to "resulted from the negligent failure of defendant C&O to maintain its dock for use by the S.S. McKee Sons crew."[1] Cross claim ¶9.

On the day before the trial began, the plaintiff settled her action against Amersand in the amount of $40,000 leaving for trial only the plaintiff's claim and Amersand's cross claim against C&O. During his opening statement, plaintiff's counsel told the jury that plaintiff's claim against Amersand had been settled and he told the jury the amount of the settlement. The court denied C&O's motion for a mistrial and instead bifurcated the trial requiring the jury to first resolve the issue of liability.

At trial, we ruled that Ohio law and not maritime law applied to both claims against C&O and submitted those issues to the jury with instructions consistent with Ohio law. We also submitted to the jury seven interrogatories which Amersand's counsel prepared. Amersand's counsel agreed that the jury's response to those interrogatories would adequately resolve the cross claim Amersand

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1. On August 19, 1977, the plaintiff and defendant Boland & Cornelius stipulated to the dismissal of Boland & Cornelius as a defendant and thereafter the action was defended by Amersand.

filed against C&O. The jury returned a general verdict in favor of the C&O as to plaintiff's action. The responses to the seven interrogatories were consistent with the general verdict. Those responses indicate that the jury found that the C&O was not negligent, that plaintiff's decedent was contributorily negligent which proximately caused his death. The jury also found, however, that the decedent drowned after he entered the water from C&O's dock.

The plaintiff has filed a motion for a new trial, arguing that the verdict is against the weight of the evidence, that the court erred in applying Ohio instead of maritime law to her claim, and that the court should have recused itself. The cross-plaintiff Amersand has also moved for a new trial or, in the alternative, to amend the judgment, arguing that the court erred in applying Ohio instead of maritime law to its cross claim and that the judgment should be amended to conform to the findings of the jury. The defendant C&O has filed responses in opposition to the plaintiffs' motions.

First, we adhere to our prior ruling that Ohio law applies to both the plaintiff's and cross-plaintiff's claims. In *Wiper v. Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir. 1965), *cert. denied* 382 U.S. 812, the court held that Michigan law governed the action of the executrix of a seaman's estate against a dock owner for negligently maintaining the dock. The court held that docks and wharves are considered extensions of the land so that any tort was committed and completed on land. *Id.* at 730. The plaintiff's claim is controlled by *Wiper*. *See Koserkoff v. Chesapeake & Ohio Railway Company*, 427 F.2d 1049 (6th Cir. 1970).

The cross plaintiff relies upon *Sims v. Chesapeake and Ohio Railway Company*, 520 F.2d 556 (6th Cir. 1975), where the court held that maritime law applied to the

cross claim of a ship owner against a wharfinger for attorney's fees and expenses incurred in defending against the main action. Regardless whether Ohio or maritime law is applied to the facts of the instant case, however, Amersand cannot recover against the railroad. In *Spaulding v. Parry Navigation Co.*, 187 F.2d 257 (2d Cir. 1951) *cert. denied* 342 U.S. 918 (1952), the court considered the case where a seaman was injured descending a ladder and recovered from his employer under the Jones Act. The employer then sought indemnification from the supplier of the ladder. The court indicated that the first question presented by those facts was whether the third party defendant was liable to the original plaintiff. *Id.* at 259. The court concluded that there was no right to indemnification under either New Jersey or maritime law since the plaintiff could not have recovered against the third party defendant. *Id.* at 260-61. The instant case is very similar. Unlike *Sims*, the jury found that the defendant C&O was not liable for the drowning of plaintiff's decedent. Therefore, the defendant C&O cannot be liable to the cross plaintiff for the amount that the cross plaintiff paid in settlement of the case. The fact that the plaintiff's decedent's contributory negligence was a defense in her action against the railroad but would not have been a defense in her action against the cross plaintiff is not relevant. *See Kennedy v. Pennsylvania Railroad Co.*, 282 F.2d 705, 708-09 (3d Cir. 1960); *Reynolds v. Southern Railroad Co.*, 320 F.Supp. 1141, 1145 (N.D. Ga. 1969). Otherwise, it would be possible for the plaintiff and the cross plaintiff, who were at one time employee and employer, to defeat the rights of the defendant through either settlement or suit.

Second, we hold that there is adequate evidence in the record to support the jury's verdict and that the judgment entered by the court is not in conflict with the

verdict or the interrogatories answered by the jury. The jury did not, as cross plaintiff contends, find in its answer to Interrogatory No. 4 that the dock area was unsafe, but rather that the plaintiff's decedent assumed the risk of an unsafe dock area. That answer could easily read as consistent with the verdict, in that the jury could have concluded that the plaintiff's decedent's actions were such that he assumed the risk of an unsafe dock area before they even reached the issue of whether the dock was, in fact, unsafe.

Finally, we hold that plaintiff's belated request for this court's recusal lacks merit. Surprisingly, plaintiff's counsel raises this as a ground for a new trial after admitting knowledge prior to trial of the facts now asserted for recusal. If the plaintiff or plaintiff's counsel were concerned with those facts, they should have raised the issue prior to trial and not waited until after a jury verdict was entered against plaintiff. The defendant correctly indicates in its response that the plaintiff cites no authority that would have required recusal in this case.

NOW, THEREFORE, IT IS ORDERED that the plaintiff's motion for a new trial be and the same hereby is DENIED;

IT IS FURTHER ORDERED that the cross plaintiff's motion for a new trial or alternatively to amend the judgment be and the same hereby is DENIED.

/s/ ROBERT E. DEMASCIO
United States District Judge

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 20, 1980)

No. 78-1486
No. 78-1487

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PEGGY TATE SMITH, Administratrix of the Estate of James E. Tate, Deceased,
Plaintiff-Appellant,

v.

AMERSAND STEAMSHIP CORPORATION,
Defendant and Cross-Claimant-Appellant,

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant and Cross-Defendant-Appellee.

ORDER

Before: EDWARDS, *Chief Circuit Judge;* BROWN, *Circuit Judge;* and CECIL, *Senior Circuit Judge.*

Plaintiff's deceased, James Tate, was a wheelsman on a ship owned by defendant Amersand Steamship Corporation. While the ship was tied up at a dock at Oregon, Ohio owned by defendant Chesapeake and Ohio Railway Co. and while coal was being loaded from the dock on the ship, Tate fell into the water and was drowned.

An action for the death of Tate was brought against Amersand under the Jones Act for negligence and under

the general maritime law for unseaworthiness. The C. and O. Railway was joined as a defendant and sued for negligence with respect to the condition of the dock under the general maritime law. Amersand filed a cross-action against the C. and O. Railway for indemnity. Amersand settled the claim against it as the case went to trial but continued to seek indemnity from C. and O. Railway.

The district court submitted to the jury for a general verdict the question of the liability of C. and O. Railway for the death of Tate and for indemnity to Amersand and the jury found no liability. The court also submitted interrogatories prepared by Amersand to which the jury answered that the C. and O. Railway was not guilty of negligence and was not guilty of negligence that proximately caused the death; that Tate was guilty of proximate contributory negligence and assumed the risk; and that Tate entered the water from the dock. The district judge entered judgment for the C. and O. Railway as to the action filed by Tate's estate and the cross-action for indemnity filed by Amersand, and both the estate and Amersand appealed.

Plaintiff, on appeal, contends that the district judge should have disqualified himself pursuant to 28 U.S.C.A. § 455(a) because "his impartiality might reasonably be questioned." It appears that the attorney representing the C. and O. Railway also represented another defendant in an unrelated case in which the district judge and his wife were plaintiffs. There is a dispute as to when plaintiff discovered this, but it occurred no later than the last day of the trial and no objection was made until after the verdict. The argument seems to be that appearance of impartiality can reasonably be questioned because the judge might be inclined to deal favorably with the C. and O. Railway in the instant case so that the C. and O. Railway's counsel would deal favorably with the judge

in the other case that that counsel is defending for another client. On the other hand, it could just as well be argued that the impartiality of the judge could reasonably be questioned from the C. and O. Railway's viewpoint because its lawyer in the instant case had the duty to seek to defeat the judge's claim in the other case. Under the facts and circumstances shown here, we do not believe that the judge's impartiality so far as plaintiff was concerned might reasonably be questioned. In any event plaintiff waived this issue by knowingly failing to present it prior to the jury verdict.

Plaintiff further contends that the district judge erred in determining that Ohio law rather than maritime law controlled the death claim against the C. and O. Railway. We conclude that, in view of the decision of this court in *Wiper v. Great Lakes Engineering Works,* 340 F.2d 727 (6th Cir. 1965) and since the alleged negligence had to do with the dock owned and operated by the C. and O. Railway, the district court was correct in applying Ohio law. Contrary to plaintiff's contention, *Executive Jet Aviation v. Cleveland,* 409 U.S. 249 (1972) does not require a different result; the core decision there was that, though the airplane crash occurred on Lake Erie and therefore was located within maritime jurisdiction, maritime law did not apply because the flight was from Cleveland, Ohio to Portland, Maine and the alleged negligence that caused the crash occurred at the airport on land. Thus for maritime jurisdiction there must be "locality plus," and the locality aspect of the test has not, according to *Wiper,* here been satisfied. Further, even if maritime law applied, plaintiff would have to show negligence on the part of the C. and O. Railway, and the jury found no negligence.

Plaintiff lastly contends that the district court committed reversible error with respect to the interrogatory

submitted on contributory negligence, claiming that such was improper even under Ohio law. No objection was made to the interrogatory. We believe it was satisfactory under the circumstances. In any case, the jury found no negligence on the part of the C. and O. Railway. There is no merit to this contention.

As stated, Amersand, in its cross-action against the C. and O. Railway, sought indemnity, and contends that the district judge was in error in applying Ohio law to this claim and that maritime law should have been applied. We conclude that, under the decision of this court in *Sims v. Chesapeake and Ohio Railway Co.*, 520 F.2d 556 (6th Cir. 1975), Amersand's claim against the C. and O. Railway was pursuant to an implied warranty by the C. and O. Railway, as a wharfinger, to Amersand of workmanlike performance and to furnish a reasonably safe dock and that maritime law is applicable to the claim under this implied warranty. Thus the district judge was in error in applying Ohio law. Even so, the error was harmless because the duty created by the implied warranty, as is indicated in *Sims,* was to afford a reasonably safe dock, and the jury found no negligence on the part of the C. and O. Railway.

The judgment of the district court is therefore affirmed.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed September 4, 1980)

No. 78-1486

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PEGGY TATE SMITH, Administratrix of the Estate of James E. Tate, Deceased,
Plaintiff-Appellant,

v.

AMERSAND STEAMSHIP CORPORATION,
Defendant and Cross-Claimant-Appellant,

THE CHESAPEAKE AND OHIO RAILROAD COMPANY,
Defendant and Cross-Defendant-Appellee.

ORDER

Before: EDWARDS, *Chief Circuit Judge;* BROWN, *Circuit Judge;* and CECIL, *Senior Circuit Judge.*

None of the active members of this court having favored rehearing en banc, the petition for rehearing has now been referred to the hearing panel for consideration.

Upon such consideration, it is the conclusion of the panel that the petition for rehearing be and the same is hereby denied.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

28 U.S.C. §144

§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

American Bar Association, Code of Judicial Conduct Cannon 3 C. (1)

C. DISQUALIFICATION.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge of such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

* * * * *